DEPARTMENT OF THE TREASURY
FINANCIAL CRIMES ENFORCEMENT NETWORK

APR 8 2005

CHIEF COUNSEL OPINION 2005-1

Re: Applicability of Bank Secrecy Act Safe Harbor

Dear

You have requested a legal opinion from the Financial Crimes Enforcement Network on behalf of your client, on whether a report to law enforcement authorities of activity that already has been reported in a suspicious activity report (SAR) would cause your client to lose the protection of the Bank Secrecy Act safe harbor. Such reporting would not cause your client to lose the protection of the safe harbor; indeed, in some circumstances, our SAR rule affirmatively mandates that it be done.

FinCEN's SAR rule for banks, 31 CFR 103.18, requires a bank to report a transaction conducted or attempted to be conducted by, at, or through the bank involving or aggregating at least $5,000, where the bank knows, suspects or has reason to suspect that the transaction (1) involves the proceeds of illegal activity or is intended to hide or disguise such proceeds; (2) is designed to evade the requirements of the Bank Secrecy Act or its implementing regulations; or (3) has no business or apparent lawful purpose or is not the sort in which the customer ordinarily engages and the bank knows of no reasonable explanation after examining the relevant facts. The rule further requires, in situations involving violations requiring immediate attention, such as an ongoing money laundering scheme, that the bank "immediately notify, by telephone, an appropriate law enforcement authority in addition to timely filing a SAR." See 31 CFR 103.18(b)(3).

The rule further states (31 CFR 103.18(e)) that any bank, director, officer, employee or agent that makes a report pursuant to the rule is entitled to the full protection of the safe harbor for filers under 31 U.S.C. 5318(g)(3), which states:

> Any financial institution that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this subsection or any other authority, and any director, officer, employee, or agent of such institution who makes, or requires another to make any such disclosure, shall not be liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, or under any contract or other legally enforceable agreement (including any arbitration agreement), for such disclosure or for any failure to provide

notice of such disclosure to the person who is the subject of such disclosure or any other person identified in the disclosure.

There are two sections of the statutory safe harbor that would apply to the situation you have described. First, to the extent the bank made a report to law enforcement of a violation requiring immediate attention , the bank would be making a disclosure required by our rule, which, under section 5318(g)(3) would constitute "a disclosure pursuant to this subsection" and thus protected by the express language of the safe harbor. See 31 CFR 103.18(b)(3) and (e); see also Stoutt v. Banco Popular de Puerto Rico, 320 F.3d 26, 29 (1st Cir. 2003) (noting this clause protects disclosures made under Treasury's authority to compel reports). Second, the language of the safe harbor also expressly protects a "voluntary disclosure of a possible violation of law or regulation to a government agency," regardless of whether it is required by this subsection or other authority. As FinCEN noted in the preamble to the final bank SAR rule, a voluntary report is "fully covered" by the protection against liability in section 5318(g)(3). See 61 F.R. 4326, 4328 (February 5, 1996). See also Stoutt, supra, 320 F.3d at 30 (voluntary disclosures entitled to protection independent of protection afforded SAR disclosures); (Gregory v. Bank One, Indiana, N.A. 200 F.Supp.2d 1000, 1003 n.4 (safe harbor covers all reports of suspicious activity to law enforcement and financial institution supervisors, regardless of whether they are required to be filed under the Bank Secrecy Act or are filed on a voluntary basis); Whitney National Bank v. Karam, 306 F.Supp.2d 678 (S.D. Tex. 2004) (same). Thus, even in situations not requiring immediate attention, a bank that contacts law enforcement regarding a possible violation of law or regulation, in addition to filing a SAR, does not lose the protection of the safe harbor.

In conclusion, should the bank contact law enforcement concerning suspicious activity that has been reported on a SAR, it would remain entitled to the protection of the safe harbor of 31 U.S.C. 5318(g)(3). If you have any further questions, feel free to contact the Office of Chief Counsel at (703) 905-3590. The Financial Crimes Enforcement Network reserves the right to publish this letter as guidance with the identifying information of your client and yourself redacted; please contact this office within 14 days if you believe there is any additional information entitled to confidentiality.

Sincerely,

Judith R. Starr

Judith R. Starr
Chief Counsel